

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ADAM WYNN TINGLEY,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS et al.,

Defendants.

Case No. 3:14-cv-00358-MMD-VPC

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*, a motion for appointment of counsel, and a motion to compel. (Dkt. no. 1, 1-1, 1-3, 3.) The matter of the filing fee shall be temporarily deferred. The Court now screens Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential

1 elements: (1) the violation of a right secured by the Constitution or laws of the United
2 States, and (2) that the alleged violation was committed by a person acting under color
3 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

4 In addition to the screening requirements under § 1915A, pursuant to the Prison
5 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
6 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
7 claim on which relief may be granted, or seeks monetary relief against a defendant who
8 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for
9 failure to state a claim upon which relief can be granted is provided for in Federal Rule
10 of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when
11 reviewing the adequacy of a complaint or an amended complaint. When a court
12 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
13 complaint with directions as to curing its deficiencies, unless it is clear from the face of
14 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
15 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

16 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
17 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
18 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of
19 facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*,
20 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true
21 all allegations of material fact stated in the complaint, and the court construes them in
22 the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957
23 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards
24 than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).
25 While the standard under Rule 12(b)(6) does not require detailed factual allegations, a
26 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
27 *Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of
28 action is insufficient. *Id.*

1 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
 2 that, because they are no more than mere conclusions, are not entitled to the
 3 assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal
 4 conclusions can provide the framework of a complaint, they must be supported with
 5 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should
 6 assume their veracity and then determine whether they plausibly give rise to an
 7 entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for
 8 relief . . . [is] a context-specific task that requires the reviewing court to draw on its
 9 judicial experience and common sense.” *Id.*

10 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
 11 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
 12 includes claims based on legal conclusions that are untenable (e.g., claims against
 13 defendants who are immune from suit or claims of infringement of a legal interest which
 14 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 15 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
 16 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

17 **II. SCREENING OF COMPLAINT**

18 In the complaint, Plaintiff sues multiple defendants for events that took place
 19 while Plaintiff was incarcerated at the Northern Nevada Correctional Center (“NNCC”)
 20 and the Warm Springs Correctional Center (“WSCC”). (Dkt. no. 1-1 at 1.) Plaintiff sues
 21 the NDOC,¹ Medical Director Dr. Bannister, Medical Director Dr. Arana, and NDOC
 22 Director Greg Cox. (*Id.* at 1-2.) Plaintiff alleges two counts and seeks injunctive relief
 23 and monetary damages. (*Id.* at 5, 9.)

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 26 ¹The NDOC is an arm of the State of Nevada and is not a “person” for purposes
 27 of 42 U.S.C. § 1983. *See Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th
 28 Cir. 1997); *Black v. Nevada Dep’t of Corr.*, 2:09-cv-2343-PMP-LRL, 2010 WL 2545760,
 *2 (D. Nev. June 21, 2010). As such, the Court dismisses with prejudice all claims
 against the NDOC, as amendment would be futile.

1 The complaint alleges the following: In 2004, Plaintiff saw a prison eye doctor
2 twice, who told Plaintiff that he needed eye surgery. (*Id.* at 3). However, prison officials
3 denied the surgery request. (*Id.*) From February 2004 through June 2006, Plaintiff's pain
4 increased and ultimately he lost all sight in his left eye. (*Id.*) Dr. Bannister continued to
5 deny surgery requests. (*Id.*) In June 2006, Dr. Fisher, an outside surgeon, saw Plaintiff
6 and stated that Plaintiff's eye was in the worst condition that the doctor had ever seen.
7 (*Id.*) Dr. Fisher operated on Plaintiff and prescribed eye drops that were essential to
8 Plaintiff's recovery. (*Id.*) However, the NDOC refused to give Plaintiff his eye drops and
9 Plaintiff's surgery failed. (*Id.*) Plaintiff suffered from massive headaches and pain until
10 he had another eye surgery in February 2014. (*Id.*) Again, the surgeon prescribed eye
11 drops essential to Plaintiff's successful recovery. (*Id.*) The NDOC stopped giving the
12 eye drops to Plaintiff. (*Id.* at 4.) The outside surgeon, Dr. Komadina, had to call the
13 WSCC numerous times to request that prison officials give Plaintiff the drops. (*Id.*)
14 Plaintiff now needs another surgery due to the interruption of his second post-surgery
15 treatment. (*Id.*) Plaintiff suffers from physical and emotional pain. (*Id.*) Plaintiff alleges
16 an Eighth Amendment claim for the denial of proper treatment and a Fourteenth
17 Amendment claim for due process and equal protection for the NDOC not providing
18 surgery as requested by numerous doctors. (*Id.* at 4-5.)

19 The Court interprets Plaintiff's two counts as one claim for Eighth Amendment
20 deliberate indifference to serious medical needs. The Eighth Amendment prohibits the
21 imposition of cruel and unusual punishment and "embodies 'broad and idealistic
22 concepts of dignity, civilized standards, humanity, and decency.'" *Estelle v. Gamble*,
23 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment when he acts
24 with "deliberate indifference" to the serious medical needs of an inmate. *Farmer v.*
25 *Brennan*, 511 U.S. 825, 828 (1994). "To establish an Eighth Amendment violation, a
26 plaintiff must satisfy both an objective standard — that the deprivation was serious
27 enough to constitute cruel and unusual punishment — and a subjective standard —
28 deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).

1 To establish the first prong, “the plaintiff must show a serious medical need by
2 demonstrating that failure to treat a prisoner’s condition could result in further significant
3 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
4 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
5 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s
6 pain or possible medical need and (b) harm caused by the indifference.” *Id.*
7 “Indifference may appear when prison officials deny, delay or intentionally interfere with
8 medical treatment, or it may be shown by the way in which prison physicians provide
9 medical care.” *Id.* (internal quotations omitted). When a prisoner alleges that delay of
10 medical treatment evinces deliberate indifference, the prisoner must show that the delay
11 led to further injury. See *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404,
12 407 (9th Cir. 1985) (holding that “mere delay of surgery, without more, is insufficient to
13 state a claim of deliberate medical indifference”).

14 The Court finds that Plaintiff states a colorable claim for deliberate indifference.
15 Based on the allegations, both prison eye doctors and outside eye specialists told
16 prison officials that Plaintiff needed eye surgery. However, Bannister denied those
17 requests. When Plaintiff finally received eye surgery, prison officials interfered with his
18 post-surgery treatment by refusing to give Plaintiff the required eye drops causing
19 Plaintiff to require a second surgery. After the second eye surgery, prison officials again
20 interfered with Plaintiff’s post-surgery treatment by refusing to give Plaintiff the required
21 eye drops, leaving Plaintiff in pain and in need of a third eye surgery. This claim shall
22 proceed against Defendant Dr. Bannister. However, the Court dismisses this case,
23 without prejudice, against Defendants Arana and Cox because there are no allegations
24 against them in the complaint.

25 **III. MOTION FOR APPOINTMENT OF COUNSEL**

26 Plaintiff has filed a motion for appointment of counsel. (Dkt. no. 1-3.) A litigant
27 does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights
28 claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28

1 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person
2 unable to afford counsel.” However, the court will appoint counsel for indigent civil
3 litigants only in “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th
4 Cir. 2009) (§ 1983 action). “When determining whether ‘exceptional circumstances’
5 exist, a court must consider ‘the likelihood of success on the merits as well as the ability
6 of the petitioner to articulate his claims *pro se* in light of the complexity of the legal
7 issues involved.” *Id.* “Neither of these considerations is dispositive and instead must be
8 viewed together.” *Id.* In the instant case, the Court does not find exceptional
9 circumstances that warrant the appointment of counsel. The Court denies the motion for
10 appointment of counsel.

11 **IV. MOTION TO COMPEL**

12 Plaintiff files a motion to request production of documents from the NDOC. (Dkt.
13 no. 3.) The Court denies this motion at this time. As later discussed in this order, this
14 case will be stayed for ninety (90) days to give the parties an opportunity to settle their
15 dispute. The parties shall not engage in discovery during the stay.

16 **V. CONCLUSION**

17 For the foregoing reasons, it is ordered that a decision on the application to
18 proceed *in forma pauperis* (dkt. no. 1) is deferred.

19 It is further ordered that the Clerk of the Court shall file the complaint (dkt. no. 1-
20 1).

21 It is further ordered that the Eighth Amendment deliberate indifference to serious
22 medical needs claim shall proceed against Defendant Dr. Bannister.

23 It is further ordered that the complaint is dismissed in its entirety against
24 Defendant Nevada Department of Corrections, with prejudice, as amendment would be
25 futile.

26 It is further ordered that the complaint is dismissed in its entirety, without
27 prejudice, against Defendants Arana and Cox.

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1 It is further ordered that the motion for appointment of counsel (dkt. no. 1-3) is
2 denied.

3 It is further ordered that the motion to compel (dkt. no. 3) is denied.

4 It is further ordered that, given the nature of the claim(s) that the Court has
5 permitted to proceed, this action is stayed for ninety (90) days to allow Plaintiff and
6 Defendants an opportunity to settle their dispute before an answer is filed or the
7 discovery process begins. During this ninety-day stay period, no other pleadings or
8 papers shall be filed in this case, and the parties shall not engage in any discovery. The
9 Court will decide whether this case will be referred to the Court's Inmate Early Mediation
10 Program, and the Court will enter a subsequent order. Regardless, on or before ninety
11 (90) days from the date this order is entered, the Office of the Attorney General shall file
12 the report form attached to this order regarding the results of the 90-day stay, even if a
13 stipulation for dismissal is entered prior to the end of the 90-day stay. If the parties
14 proceed with this action, the Court will then issue an order setting a date for Defendants
15 to file an answer or other response. Following the filing of an answer, the Court will
16 issue a scheduling order setting discovery and dispositive motion deadlines.

17 It is further ordered that "settlement" may or may not include payment of money
18 damages. It also may or may not include an agreement to resolve Plaintiff's issues
19 differently. A compromise agreement is one in which neither party is completely
20 satisfied with the result, but both have given something up and both have obtained
21 something in return.

22 It is further ordered that the Clerk of the Court shall electronically serve a copy of
23 this order and a copy of Plaintiff's complaint on the Office of the Attorney General of the
24 State of Nevada, attention Kat Howe.

25 It is further ordered that the Attorney General's Office shall advise the Court
26 within twenty-one (21) days of the date of the entry of this order whether it will enter a
27 limited notice of appearance on behalf of Defendants for the purpose of settlement. No

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1 defenses or objections, including lack of service, shall be waived as a result of the filing
2 of the limited notice of appearance.

3 DATED THIS 18th day of September 2014.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ADAM WYNN TINGLEY,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS et al.,

Defendants.

Case No. 3:14-cv-00358-MMD-VPC

REPORT OF ATTORNEY GENERAL
RE: RESULTS OF 90-DAY STAY

NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL SHALL FILE THIS FORM. THE INMATE PLAINTIFF SHALL NOT FILE THIS FORM.

On _____ [*the date of the issuance of the screening order*], the Court issued its screening order stating that it had conducted its screening pursuant to 28 U.S.C. § 1915A, and that certain specified claims in this case would proceed. The Court ordered the Office of the Attorney General of the State of Nevada to file a report ninety (90) days after the date of the entry of the Court's screening order to indicate the status of the case at the end of the 90-day stay. By filing this form, the Office of the Attorney General hereby complies.

REPORT FORM

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

Situation One: Mediated Case: The case was assigned to mediation by a court-appointed mediator during the 90-day stay. [If this statement is accurate, check **ONE** of the six statements below and fill in any additional information as required, then proceed to the signature block.]

____ None of the above five statements describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

* * * * *

____ The parties engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

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_____ The parties have not engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

_____ None of the above three statements fully describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

Submitted this _____ day of _____, _____ by:

Attorney Name: _____
Print Signature

Address: _____ Phone: _____
_____ Email: _____